

FEES, CHARGES, AND BILLING

38. Article 19 deals with fees, charges, and billing. Appendix I provides a schedule of fees and charges. As required by FTA 96, SWBT's rates for pole attachment and conduit occupancy are determined in accordance with 47 U.S.C. § 224(d). These are the same rates applicable to cable television systems. In setting these rates, SWBT follows the methodology set forth by the FCC in CC Docket No. 86-212. Although none of the states in which SWBT is an incumbent local exchange carrier have elected to regulate pole attachment rates generally, SWBT will comply with orders of state commissions in interconnection arbitration proceedings. For example, the Oklahoma Corporation Commission has dictated that SWBT's charges for inner duct be 1/3 the full duct rate. Although it remains to be determined whether this is the rate which would be set by the FCC if it were deciding rates to be charged for inner duct, SWBT will comply with the Oklahoma Corporation Commission order as long as it remains in effect.

39. Article 19 and Appendix I generally provide that SWBT will be reimbursed, on a case-by-case basis, for costs incurred in connection with make-ready work. Cost-based charges will also apply, on a case-by-case basis, for other work performed by SWBT personnel such as work performed in connection with making records available to requesting parties.

40. At this time, SWBT does not charge for access to rights-of-way owned or controlled by SWBT. Cost-based charges will be assessed, on a case-by-case basis, for records searches, copying costs, and other expenses actually incurred in the process of

providing access to rights-of-way.

41. Only two kinds of administrative fees (as distinguished from cost-based reimbursements assessed on a case-by-case basis) are contemplated. The first is a one-time contract administration fee of \$250. This fee is due and payable when the Master Agreement is executed. Record-keeping fees not exceeding \$125 may be charged in connection with records and billing changes resulting from the sale, consolidation, or other transfer of Applicant's business or facilities, name changes, and the like. *Master Agreement*, Appendix I(C). No fixed administrative fees are assessed in connection with individual applications for access to SWBT's poles, ducts, conduits, or rights-of-way.

42. Section 19.09 provides that challenges to SWBT's charging methodologies will be brought, in the first instance, before the FCC. Section 19.10 provides that all charges and fees shall be subject to all applicable federal and state laws, regulations, and commission orders.

**COMPLIANCE WITH FCC POLE ATTACHMENT COMPLAINT
PROCEDURES RULES AND THE FIRST INTERCONNECTION ORDER**

43. The First Interconnection Order contemplates that "utilities generally must accommodate requests for access by telecommunications carriers and cable operators." *First Interconnection Order*, ¶ 1123. The entire Master Agreement is based on that principle.

44. The First Interconnection Order also contemplates that utilities may impose reasonable conditions of access. Recognizing that there are millions of utility poles and untold miles of conduit in the nation, and that many variables must be taken into consideration, the FCC has stated: “We conclude that the reasonableness of particular conditions of access should be resolved on a case-specific basis.” *First Interconnection Order*, ¶ 1143. Accordingly, the FCC has not established a “comprehensive regime of specific rules” but has instead established “a few rules supplemented by certain guidelines and presumptions that we believe will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements.” *Id.*

FIVE RULES OF GENERAL APPLICABILITY

45. The First Interconnection Order establishes five rules of general applicability.

46. Codes The first rule is stated as follows: “First, in evaluating a request for access, a utility may continue to rely on such codes as the NESC to prescribe standards with respect to capacity, safety, reliability, and general engineering principles.” *First Interconnection Order*, ¶ 1151. In the Master Agreement, SWBT and the party seeking access agree that each party will comply with the standards set forth in Bellcore’s Blue Book Manual of Construction Practices, the National Electrical Safety Code, and the National Electric Code. *Master Agreement*, § 6.04.

47. Federal Requirements The second rule is stated as follows: “Second, federal requirements, such as those imposed by FERC and OSHA, will continue to apply to utilities to the extent such requirements affect requests for attachments to utility

facilities under section 224(f)(1).” *First Interconnection Order*, ¶ 1152. SWBT has interpreted this rule as authorizing SWBT to require, as a condition of access, that parties seeking access to SWBT’s poles, ducts, conduits, and rights-of-way comply with the same federal requirements applicable to SWBT itself. There are a number of provisions in the Master Agreement requiring attaching parties to comply with federal law. *See, e.g., Master Agreement* §§ 6.05(a), 6.09(f), and 6.14.

48. State and Local Requirements The third rule is that “For present purposes, we conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).” *First Interconnection Order*, ¶ 1154. SWBT has interpreted this rule as authorizing SWBT to require, as a condition of access, that parties seeking access to SWBT’s poles, ducts, conduits, and rights-of-way comply with applicable provisions of state and local law. There are several provisions in the Master Agreement requiring attaching parties to comply with state and local law. *See, e.g., Master Agreement* § 6.15 (calling for adherence to state and local laws, ordinances, and regulations as well as federal laws). Nothing in the Master Agreement prevents an attaching party from seeking to invalidate through appropriate legal channels any state or local law which the attaching party believes to be contrary to federal policy.

49. Uniform Application The fourth rule is stated as follows: “Fourth, where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided herein, the utility must charge all parties an attachment rate that

does not exceed the maximum amount permitted by the formula we have devised for such use” *First Interconnection Order*, ¶ 1156 Under this nondiscrimination rule, SWBT must apply the same rates and rules to all telecommunications carriers (including carriers negotiating interconnection agreements) and cable system operators. Although Congress clearly contemplates that the FCC may eventually adopt rates for telecommunications carriers which are different from those charged to cable system operators, the First Interconnection Order contemplates that, for the time being, the rates which SWBT charges must be uniform and that the same terms and conditions of access apply equally to all telecommunications carriers and cable system operators. SWBT has attempted to achieve the required uniformity by developing a Master Agreement that is uniformly available to all telecommunications carriers and cable system operators. To the extent that access is provided to telecommunications carriers and cable system operators with whom SWBT has no attachment agreement, the requirements set forth in the Master Agreement will be made conditions of access by the party requesting access.

50. Appendix I to the Agreement incorporates uniform rates for access to poles, ducts, and conduits that do not exceed the maximum amount permitted by the FCC formula. In calculating the attachment rates set forth in Appendix I, SWBT follows the formula and methodology adopted by the FCC in CC Docket No. 86-212, Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles (released July 23, 1987). The FCC formula yields a maximum rate and the rates SWBT charges under the Agreement are at or below this maximum rate. Variations from the maximum rate result from either an order from the state commission or as a

direct result of negotiations with cable operators in Arkansas, Kansas, Missouri, Oklahoma and Texas. In the case of poles, the current rate SWBT charges is the result of a settlement of rates negotiated with representatives of the cable operators in these five states. The FCC has customarily allowed utilities and cable operators or their associations to negotiate such rate settlements independent of the formula. In the case of conduit, the Oklahoma Commission directed SWBT to charge a rate for inner duct using a "one-third duct convention" which may result in an inner duct rate considerably lower than the rate obtained based on SWBT's application of the existing FCC methodology to its conduit rates.

51. Nondiscrimination The fifth rule is stated as follows: "Fifth, except as specifically noted below, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services." *First Interconnection Order*, ¶ 1157. SWBT interprets this fifth rule as establishing a general nondiscrimination requirement intended to enable other telecommunications carriers and cable system operators to have full access to SWBT's poles, ducts, conduits, and rights-of-way at rates, and under terms and conditions, which do not place such carriers and cable operators at a competitive disadvantage with SWBT and its affiliates. This rule is applied throughout the Master Agreement. For example, the Master Agreement provides that certain published standards shall "equally apply to either party with respect to facilities attached to or placed in SWBT's poles, duct, conduits, and rights-of-way...." *Master Agreement*, § 6.04. The Master Agreement permits requesting parties to select the space they will occupy and calls on requesting parties to base their selections on "the same criteria SWBT applies to itself." *Master*

Agreement, § 8.01. As discussed below, parties seeking access may be assigned space no more than one year prior to occupancy, and that rule applies equally to SWBT. *Master Agreement*, § 8.02(b). Based on my review of the Master Agreement, it is my opinion that all provisions of the Master Agreement comply fully with the nondiscrimination rule set forth in Paragraph 1157.

GENERAL GUIDELINES

52. The First Interconnection Order also sets forth a number of general guidelines intended “to facilitate the negotiation and mutual performance of fair, pro-competitive access agreements.” *First Interconnection Order*, ¶ 1143.

53. Capacity Expansion The FCC has declared that utilities are able to expand capacity for themselves and must do likewise for other telecommunications carriers and cable operators. *First Interconnection Order*, ¶ 1162. The Master Agreement includes a section specifically addressing capacity expansion issues. *Master Agreement*, § 10.02. This section provides that at the request of a party seeking access, SWBT will modify its poles or conduit system to accommodate the requesting party’s facilities consistent with the capacity, safety, reliability, and engineering considerations which SWBT would apply to itself if the work were performed for SWBT’s own benefit. *Master Agreement*, § 10.02(b). Specific examples of capacity expansion techniques are set forth in the Master Agreement. These include installation of inner duct, cable consolidations, and removal of dead and inactive cables. Capacity expansions and other make-ready work are to be performed within the same time intervals which would apply if SWBT were performing the work for itself. *Master Agreement*, §§

10.02(b), 10.05(b). If SWBT cannot start or complete the work in time to meet a requesting party's needs, the requesting party may make alternative arrangements to have the work performed by an "authorized contractor" selected from a list of contractors mutually approved by SWBT and the requesting party. *Id.* In addition, SWBT will permit requesting parties to utilize certain disfavored construction techniques (placement of pole attachments on both the "field" side and the "road" side of a pole; placement of extension arms and stand-off brackets on poles) as a means avoiding high or unusual expenditures. *Master Agreement*, § 6.03. In general, a requesting party in seeking access may request that SWBT perform make-ready work or facilities modifications to expand capacity. *Master Agreement*, § 9.02(e). If the request for access includes specific proposals for expanding capacity, SWBT may not deny access without specifically addressing such proposals in its written denial statement. *Master Agreement*, § 10.01(b). If a denial is anticipated, the Master Agreement directs SWBT to notify the requesting party promptly and, at the requesting party's request, to discuss alternatives to denial. *Master Agreement*, § 10.01. These provisions fully satisfy the guideline that "Before denying access based on lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access." *First Interconnection Order*, ¶ 1163.

54. Space Reservations Prior to the release of the First Interconnection Order, SWBT adhered to a long-established policy of denying access to ducts, conduits, or rights-of-way when SWBT anticipated the need to utilize such, ducts, conduits, or rights-of-way within the next five years. Denials of pole space on lack of capacity grounds rarely, if ever, occurred. The reason for SWBT's policy was simple. It is not efficient to build

undersized facilities when you know that you will need larger facilities in the foreseeable future. This is especially true when the construction costs for a facility (e.g., conduit runs under streets or highways) are high or when the construction activities will inconvenience private landowners or the public. Having invested in facilities constructed to meet its own service needs, SWBT believed (and continues to believe) that it should be able to utilize its own property to meet demands for service by its own customers. In this regard, SWBT is required by law to provide service local exchange services to business and residential customers in the service areas where it is an incumbent LEC.

55. The FCC has recognized that electric utilities may reserve space for themselves “if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service.” *First Interconnection Order*, ¶ 1169. The FCC has, however, declared that a different result is required with respect to utilities providing telecommunications or video services. More specifically, the FCC has stated: “Permitting an incumbent LEC ... to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.” *First Interconnection Order* ¶ 1170.

56. SWBT has incorporated in its Master Agreement a nondiscriminatory means by which cable operators and telecommunications carriers, including SWBT, may be assigned pole attachment or conduit occupancy space for a one-year period. *Master Agreement*,

§ 8.02. Under the Master Agreement, any pole, duct, conduit, or right-of-way space which is not already occupied or assigned is available for assignment to SWBT or other telecommunications carriers and cable operators. *Master Agreement*, § 3.07. Space that is assigned is not available for use by other parties. *Master Agreement*, § 3.05. When a written request for access is submitted, the space selected by the applicant will be assigned to that applicant for a pre-occupancy period not to exceed 12 months. *Master Agreement*, § 8.02(a). A party requesting access may also have space provisionally assigned to it 30-days before filing a completed application. *Master Agreement*, § 8.02(b). Assignments of space lapse if the space is not utilized within one year, unless the applicant's failure to utilize space results from SWBT's failure to complete make-ready work on schedule. *Master Agreement*, § 8.02(e). If SWBT assigns space to itself, the assignment lapses 12 months after the date the assignment is entered in the appropriate records. *Master Agreement*, § 8.02(f). These provisions are nondiscriminatory and therefore comply with the nondiscrimination requirements of § 224(f)(1) and Paragraph 1170 of the First Interconnection Order.

57. Access Denials Based on Issues of Capacity, Safety, Reliability, and Engineering

Considerations The First Interconnection Order concludes that “any utility may take into account issues of capacity, safety, reliability, and engineering when considering attachment requests, provided the assessment of such factors is done in a nondiscriminatory manner.” *First Interconnection Order*, ¶ 1176. Further, the FCC's Pole Attachment Complaint Procedures specifically state that “a utility may deny a cable television system or telecommunications carrier access to its poles, ducts, conduits, or rights-of-way on a non-discriminatory basis where there is insufficient

capacity or for reasons of safety, reliability and generally applicable engineering purposes.” 47 C.F.R. 1.1403(a). The Pole Attachment Complaint Procedures further require that a utility’s denial of access “shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.” 47 C.F.R. 1.1403(b); *see also First Interconnection Order*, ¶ 1224. The Master Agreement contemplates that SWBT may deny access on these approved grounds and requires SWBT, in the event of an access denial, to provide the party seeking access with a written denial statement which meets these requirements. *Master Agreement*, § 10.01(b).

58. Access to the Property of Third-Party Property Owners The First Interconnection Order notes that in most cases, the rights of utilities to place facilities on the property of third-party property owners is governed by state law. *First Interconnection Order*, ¶ 1179. Stated differently, a utility may obtain the right to have access to the property of third parties, but whether the utility owns or controls the property to the extent required to permit other parties to have access to that property will depend on state law. The FCC has also stated its belief that utilities should exercise eminent domain authority to expand existing rights-of-way over private property in order to accommodate requests for access. *First Interconnection Order*, ¶ 1181. The Master Agreement deals with these issues in accordance with the FCC guidelines. *Master Agreement*, § 5.03. The Master Agreement contemplates that SWBT will exercise its rights of eminent domain if the party seeking access does not have its own right of eminent domain under state

law. *Master Agreement*, § 5.03(c)-(d).

59. Personnel Working in Proximity of SWBT's Poles, Ducts, Conduits, and Rights-of-

Way The First Interconnection Order states that utilities may require that “only properly trained persons work in the proximity of the utilities’ lines....” *First Interconnection Order*, ¶ 1182. The Order further provides, however, that “we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility.” *Id.* The Master Agreement fully complies with these guidelines. There is a general requirement that only properly trained persons shall work on, within, or in the vicinity of SWBT’s poles, ducts, conduits, and rights-of-way. *Master Agreement*, § 6.09(b). It is, however, the responsibility of the party seeking access, and not SWBT, to determine that persons acting on behalf of the party seeking access have the proper training. *Id.* Further, the party seeking access is responsible for the installation, maintenance, repair, and removal of its own facilities. *Master Agreement*, §§ 11.01, 12.05, 15.02, and 18.01. The requesting party is responsible for selecting, paying, and directing the activities of these personnel. *Id.*

60. As stated above, SWBT has gone farther than the First Interconnection Order requires by permitting parties requesting access to arrange for the performance of make-ready work and facilities expansion when SWBT is unable to begin or complete the work in accordance with the requesting party’s needs. *See, e.g., Master Agreement*, § 10.05(b). In these situations, which involve the modification of SWBT’s own facilities, as distinguished from the installation, maintenance, repair, and removal of the requesting

party's facilities, SWBT does expect the work to be performed by contractors approved by SWBT. *See, e.g., Master Agreement*, § 10.05(b)-(c). In a few cases, due to the nature of the work (*e.g.*, cable consolidations of SWBT's own cables), SWBT has not authorized the work to be performed by the requesting party or contractors acting on the requesting party's behalf. These limitations are fully consistent with the First Interconnection Order because that Order does not require utilities to permit make-ready work to be performed by parties requesting access.

61. Definitions of Poles, Ducts, Conduits, and Rights-of-Way The First Interconnection Order does not include a precise definition of "pole, duct, conduit, or right-of-way" but has rejected the overly broad "pathway" concept advocated by AT&T. *First Interconnection Order*, ¶ 1185. The FCC has further stated that "The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility." *Id.* SWBT has included in its definitions of the terms "pole," "duct," "conduit," and "right-of-way" language to the effect that these terms include "all [poles, ducts, conduits, and rights-of-way] subject to the Pole Attachment Act." *Master Agreement*, §§ 3.08, 3.11, 3.25, and 3.30.

62. Types of Equipment Which May Be Attached The First Interconnection Order does not describe the specific types of telecommunications or cable equipment which may be attached to SWBT's poles or placed in SWBT's ducts, conduits, or rights-of-way. *First Interconnection Order*, ¶ 1186. SWBT's Master Agreement places no restrictions

on the types of equipment which may be placed. As suggested by the FCC guidelines, SWBT will, in deciding whether to grant or deny access, assess the request through the application of capacity, safety, reliability, and engineering principles.

63. Notices Prior to Removal of Facilities The Pole Attachment Complaint Procedures contemplate that utilities will provide cable system operators or telecommunications carriers no less than 60 days written notice prior to removing their facilities or terminating service to those facilities “arising out of a rate, term or condition of the cable television system operator’s or telecommunication carrier’s pole attachment agreement.” 47 C.F.R. 1.1403(c)(1). This provision clearly reflects the FCC’s view that utilities may enforce the terms of pole attachment agreements (or conditions of access by attaching parties with whom the utility has no pole attachment agreement). The Master Agreement provides that SWBT may remove unauthorized attachments on 60-days notice. *Master Agreement*, § 17.11. The Master Agreement further calls upon the attaching party to remove its facilities under certain specified circumstances and provides that if the attaching party fails to meet these obligations, SWBT may remove the facilities 60 days after giving the attaching party written notice of its intent to do so. *Master Agreement*, § 18.07. These provisions are fully consistent with the 60-day notice requirement.

64. Notices of Increases Prior to Increasing Pole Attachment Rates The Pole Attachment Complaint Procedures further contemplate that utilities may from time to time increase pole attachment rates, provided that they give cable system operators or telecommunications carriers no less than 60 days written notice prior to increasing

rates. 47 C.F.R. 1.1403(c)(2). The Master Agreement provides that SWBT may modify charges and fees upon at least 60 days' prior written notice. *Master Agreement*, § 19.08.

65. Notices Prior to the Modification or Alteration of Poles, Ducts, Conduits, or Rights-of-

Way The Pole Attachment Act and Pole Attachment Complaint Procedures also contemplate that utilities provide advance written notice to attaching cable system operators and telecommunications carriers before modifying or altering poles, ducts, conduits, and rights-of-way. 47 U.S.C. § 224(h); 47 C.F.R. 1.1403(c). This requirement is interpreted in the First Interconnection Order which states that absent a private agreement establishing different notification procedures, written notification of a modification must be provided to attaching parties at least 60 days before commencement of the modification. *First Interconnection Order*, ¶ 1209. The Master Agreement acknowledges these obligations. *Master Agreement*, § 14.01.

66. Allocation of Modification Costs The Pole Attachment Act establishes a statutory “cost-causer pays” principle with respect to the rearrangement or replacement of attachments required as the result of an additional attachment or the modification of an existing attachment sought by any other entity, including the owner of the pole, duct, conduit, or right-of-way. 47 U.S.C. § 224(i). The Pole Attachment Complaint Procedures and the First Interconnection Order also address modification costs. 47 C.F.R. 1.1416(b); *First Interconnection Order*, ¶¶ 1211-1216. The First Interconnection Order contemplates that the parties benefiting from modifications assume the costs of the modification and that if more than one party benefits, each

party benefiting bear its proportionate share of the costs. In general, the party initiating the request will be the party benefiting. *First Interconnection Order*, ¶ 1211. The Master Agreement, therefore, generally requires parties seeking access to pay for facilities modifications and make-ready work attributable to their requests. *Master Agreement*, §§ 10.02(a)-(c), 19.06, Appendix I D) 1). SWBT, however, will pay for inner duct installations and for removing dead cables from its conduit system. *Master Agreement*, § 10.02(b)-(c).

67. The First Interconnection Order also contemplates that parties other than the initiating party may benefit from the modification. *First Interconnection Order*, ¶ 1212. There is no specific language in the Master Agreement addressing the allocation of costs among all users benefiting from a modification. Instead, the Master Agreement states that all charges and fees “shall be subject to all applicable federal and state laws, regulations, and commission orders, including but not limited to the Pole Attachment Act, regulations, rules, and commission orders issued thereunder.” *Master Agreement*, § 19.10. The Master Agreement also calls upon SWBT to provide requesting parties estimates of the charges for proposed make-ready work and an opportunity to negotiate with respect to proposed make-ready work. *Master Agreement*, §§ 10.04(b)-(e). These provisions, coupled with the ability of the requesting party to avail itself of the FCC complaint procedures and other dispute resolution procedures under the Master Agreement (and, if applicable, the Interconnection Agreement to which the Master Agreement is an appendix or attachment), assure all affected parties that modification costs will be properly allocated in accordance with the law.

68. Reimbursement from Parties Using Additional Capacity Created at the Expense of Other Parties The First Interconnection Order provides that parties who pay for modifications may be entitled to obtain reimbursement from other parties, including the owner of the pole or conduit facility in question, who later use additional capacity created at the expense of the initiating party. *First Interconnection Order*, ¶ 1214. The Master Agreement provides that SWBT will directly reimburse the initiating party when SWBT utilizes such additional capacity and will provide the initiating party with the information required to assist the initiating party in determining the amount, if any, which third parties utilizing the additional capacity may owe the initiating party. *Master Agreement*, § 10.08. The provision in Section 10.08 providing that the initiating party is not entitled to any pole attachment or conduit occupancy fees resulting from the additional capacity created is consistent with the First Interconnection Order, which specifically addresses that issue. *First Interconnection Order*, ¶ 1216.

69. Access to Records As stated above, the Master Agreement complies fully with the FCC's dispute resolution procedures as set forth in the applicable Pole Attachment Complaint Procedures and First Interconnection Order. 47 C.F.R. 1.1401-1.1416; *First Interconnection Order*, §§ 1222-1225. In this regard, there is an important portion of the dispute resolution procedures which has not been discussed: access to records. See *First Interconnection Order*, ¶ 1223. The Master Agreement provides far greater access to records than is contemplated by Paragraph 1223.

70. Paragraph 1223 recognizes that, in order to provide the information necessary to support a complaint alleging wrongful denial of access, a telecommunications carrier or cable system operator may need to obtain information which is available only from the utility's own records. Instead of requiring the party requesting access to use formal legal procedures such as document requests or subpoenas, the FCC has suggested that utilities voluntarily make certain information available. The First Interconnection Order states: "Thus, we expect a utility that receives a legitimate inquiry regarding access to its facilities or property to make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information. This provision eliminates the need for costly discovery in pursuing a claim of improper denial of access, including small entities with limited resources, to seek redress of such denials." *First Interconnection Order*, ¶ 1223.

71. SWBT's Master Agreement provides for access to specified records relating to SWBT's poles, ducts, conduits, and rights-of-way. Access to these records is not limited to situations in which a requesting party needs information in order to file a complaint with the FCC. Access to records and other information will be made available for "planning and other purposes." *Master Agreement*, § 7.03. As contemplated by the First Interconnection Order, the Master Agreement imposes conditions to protect proprietary information. More specifically, the Master Agreement requires that persons reviewing SWBT's records on a requesting party's behalf sign a nondisclosure agreement. *Id.* Although the Master Agreement contemplates that nondisclosure agreements may be individually negotiated, the Master Agreement

includes a nondisclosure agreement which will meet SWBT's requirements. *Master Agreement*, Appendix V.

72. Access to records is not conditioned on the submission of an application for access to specific pole attachment or conduit occupancy space. A requesting party may have access to records days, weeks, or even months in advance and may have access to those records for the purpose of making decisions as to which pole, duct, conduit, and right-of-way space the requesting party will request. This is a major accommodation which imposes substantial burdens on SWBT and goes well beyond what is required by the applicable laws.

73. Provisions Requiring Compliance with Applicable Laws, Regulations, and Commission Orders In addition, the Master Agreement includes a provision stating that the Agreement is intended to implement, rather than abridge, the parties' rights under federal and state law. Further, in the event of a conflict between any provisions of the Master Agreement and any applicable federal or state laws or regulations, "the parties' rights and remedies under federal or state laws and regulations shall take precedence over the terms of this Agreement." *Master Agreement*, § 2.02. All rates, fees, and charges are subject to all applicable federal and state laws and regulations. *Master Agreement*, § 19.10. If the applicable laws change, as they almost surely will when the FCC complies with the Congressional mandate to prescribe new regulations governing the charges for pole attachments used by telecommunications carriers to provide telecommunications carriers, 47 U.S.C. § 224(e)(1), the Master Agreement calls on the parties to engage in good faith negotiations to supplement, amend, or

replace any provisions of the Agreement affected by the change in the law. *Master Agreement*, § 32.07.

COMPLIANCE WITH STIPULATIONS AND RULINGS IN OKLAHOMA
CORPORATION COMMISSION INTERCONNECTION ARBITRATION
PROCEEDINGS

74. The Master Agreement has also been drafted to comply with interconnection arbitration orders by the Oklahoma Corporation Commission (“OCC”) and stipulations between the parties in Oklahoma interconnection arbitration proceedings.

75. In Oklahoma, the OCC decided five issues relating to access to poles, ducts, conduits, and rights-of-way in Cause No. PUD960000218, Application of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996.

76. Issue I concerned the utilization of alternative pole attachment techniques to avoid high or unusual expenditures. The Arbitrator found that SWBT’s proposal was reasonable and SWBT’s proposal was adopted by the OCC. That proposal is included in the Master Agreement. *See Master Agreement*, § 6.03 (“Infrequent Construction Techniques and Connectivity Solutions”).

77. Issue 2 dealt with the resolution of disputes at the site of emergency repair operations.

The Arbitrator found that SWBT's proposal was reasonable and SWBT's proposal was adopted by the OCC. That proposal is included in the Master Agreement. *See Master Agreement*, § 15.05 ("Order of Precedence of Work Operations; Access to Maintenance Duct and Other Unoccupied Ducts in Emergency Situations").

78. Issue 3 dealt with the performance of excavation work by AT&T in connection with the removal of retired or inactive SWBT cables. Although the parties agreed that SWBT would allow personnel acting on AT&T's behalf to perform such excavation work, AT&T objected to language calling on AT&T not to perform the work in any manner which would jeopardize or degrade the integrity of SWBT's structures or interfere with existing use of the facilities. AT&T further objected to language requiring AT&T to indemnify SWBT for damages resulting from AT&T's excavation activities. Again, the Arbitrator found that SWBT's proposal was reasonable and SWBT's proposal was adopted by the OCC. That proposal is included in the Master Agreement. *See Master Agreement*, § 10.02(c).

79. Issue 4 dealt with fees and charges and included several issues. The parties agreed that AT&T should pay SWBT for make-ready work requested by AT&T. AT&T sought to freeze rates at 1996 levels throughout the term of the Agreement. SWBT proposed that all charges be subject to annual adjustments, consistent with 47 C.F.R. 1.1403(c)(2), which permits increases in rates on 60 days notice. AT&T proposed inner duct rates equal to 1/3 the full duct rate. SWBT proposed an inner duct rate equal to 1/2 the full duct rate. The Arbitrator agreed with SWBT that annual adjustments should be

allowed and agreed with AT&T on the 1/3 duct rate. The Master Agreement does not contain specific language addressing annual rate adjustments, but the general requirement that all charges and fees shall be subject to all applicable federal and state laws, regulations, and commission orders establishes SWBT's right to annual adjustments. *Master Agreement*, § 19.10. The one-third inner duct rate appears in Appendix I B) 2) f) which acknowledges the OCC decision and states that "Pending review of that decision, SWBT shall not bill Applicant an inner duct rate exceeding 1/3 the full duct rate." This text was written in contemplation of a possible challenge to the 1/3 duct rate decision. No such challenge has been made to date and the general requirement that all rates conform to commission orders effectively establishes the 1/3 duct rate as the Oklahoma inner duct rate as long as the OCC's decision remains in effect.

80. Issue No. 5 dealt with the manner in which assignments of pole, duct, conduit, and right-of-way space would be administered. SWBT proposed that space be assigned only after AT&T submitted a license application and paid for estimated make-ready work, if any. AT&T proposed a "records-based" assignment process which would enable space to be assigned to AT&T or SWBT by making entries into "SWBT's log of space assignments/occupancies or upon SWBT's receipt of AT&T's notice to occupy unassigned space..." On this issue, the Arbitrator ruled in AT&T's favor and the OCC approved the Arbitrator's decision. Although the Master Agreement does not set forth verbatim the language approved by the Arbitrator, the substantive provisions are incorporated in the following provisions of the Master Agreement: § 8.01 (selection of space); § 8.02 (pole, duct, and conduit space assignments); § 3.05 (definition of the

term “assigned”); § 3.07 (definition of the term “available”); § 12.03 (installation of drive rings and J-hooks); and §§ 12.04, 13.03, and 15.02 (dealing with the use of “maintenance ducts” in emergency and non-emergency situations). Most, but not all, of the provisions referred to above are included in the AT&T interconnection agreement approved by the Texas Public Utility Commission in the “mega-arbitration” proceeding. No final agreement has been presented to the Oklahoma Corporation Commission and the parties are continuing to negotiate specific contract language. As stated above, however, the Master Agreement includes a provision stating that in the event of an irreconcilable conflict between any provision of the Master Agreement and any applicable federal or state laws or regulations, the parties’ rights and remedies under federal or state laws or regulations shall take precedence over the terms of the Master Agreement. *Master Agreement*, § 2.02. Accordingly, the Master Agreement effectively incorporates the OCC ruling.

81. In Cause No. PUD960000218, the parties entered into seven stipulations. The seven stipulations are incorporated in the Master Agreement, although not verbatim, as follows:

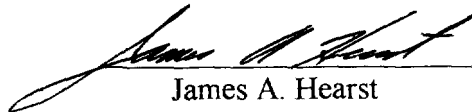
- Stipulation 1: Access to records. *See Master Agreement*, § 7.03 (access to records relating to SWBT’s poles, ducts, conduits, and rights-of-way).
- Stipulation 2: Access to poles, ducts, and conduit systems; access to rights-of-way containing CEVs and other facilities. *See Master Agreement*, § 5.03 (access to associated rights-of-way); § 5.04 (access to rights-of-way incident to use of CEVs and similar structures).
- Stipulation 3: Installation of inner duct. *See Master Agreement*, § 10.02(b) (specifically dealing with the installation of inner duct).

- Stipulation 4: Availability of unassigned inner ducts. *See Master Agreement*, § 3.07 (definition of the term “available”).
- Stipulation 5: Availability of space based on records. *See Master Agreement*, § 10.01(d) (specifically providing that space is to be made available for immediate occupancy unless further make ready-work is required).
- Stipulation 6: Agreed list of vendors authorized to perform make-ready work. *See Master Agreement*, § 10.05 (performance of make-ready work); *see also Master Agreement*, § 3.06 (definition of “authorized contractors” mutually approved to perform make-ready work).
- Stipulation 7: Modification of outside plant to accommodate access requests by telecommunications carriers and cable system operators. *See Master Agreement*, § 10.02 (obligation to construct or modify facilities to expand capacity).

CONCLUSION


82. The Master Agreement complies in all respects with the applicable federal and state legal requirements. In addition, the Master Agreement reflects SWBT’s responsiveness to issues raised by parties in interconnection negotiations. The terms, conditions, and operational procedures set forth in SWBT’s Master Agreement satisfy the “Competitive Checklist” requirements for access to poles, ducts, conduits, and rights-of-way.

The information contained in this affidavit is true and correct to the best of my knowledge and belief.


James A. Hearst

Subscribed and sworn to before me this 7th day of April, 1997.




NOTARY PUBLIC

My commission expires:

10-07-2000